INDEX

	Page
Opinion below	1
Jurisdiction	1
Questions presented	1
Statutes involved	2
Statement	3
Argument	8
Conclusion	10

CITATIONS

Cases:	
Asghari v. *INS*, 396 F. 2d 391	8
Hosseinmardi v. *INS*, 391 F. 2d 914	8
Kasravi v. *INS* (C.A. 9, July 23, 1968)	8, 9
Sovich v. *Esperdy*, 319 F. 2d 21	9
Zupicich v. *Esperdy*, 319 F. 2d 773, certiorari denied, 376 U.S. 933	9
Statutes:	
Immigration and Nationality Act:	
Section 243(h) (amended as 8 U.S.C. 1253(h))	2, 4, 6, 7, 8, 9, 10
Section 244 (amended as 8 U.S.C. 1254)	2, 7
Internal Security Act of 1950:	
Section 23	8
Refugee Relief Act:	
50 U.S.C. App. 1971(d)	5
66 Stat. 214	8
79 Stat. 918	8
Miscellaneous:	
Gordon and Rosenfield, *Immigration Law and Procedure* (1967 ed. §5.16b)	8

In the Supreme Court of the United States

OCTOBER TERM, 1968

No. 785

CHENG FU SHENG AND LIN FU MEI, PETITIONERS

v.

IMMIGRATION AND NATURALIZATION SERVICE

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (Pet. App. A) is reported at 400 F. 2d 678.

JURISDICTION

The judgment of the court of appeals was entered on September 3, 1968. The petition for a writ of certiorari was filed on November 29, 1968. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether the court below properly refused to overrule the Attorney General's exercise of discretion

in denying suspension of petitioners' deportation to Taiwan on grounds of alleged political persecution under Section 243(h) of the Immigration and Nationality Act.

2. Whether "extreme hardship" as used in Section 244 refers to a claim of political persecution in the country to which an alien may be sent, rather than hardship which would result from the fact of deportation from the United States.

STATUTES INVOLVED

Section 243(h) of the Immigration and Nationality Act, as amended (8 U.S.C. 1253(h)), provides:

> The Attorney General is authorized to withhold deportation of any alien within the United States to any country in which in his opinion the alien would be subject to persecution on account of race, religion, or political opinion and for such period of time as he deems to be necessary for such reason.

Section 244 of the Immigration and Nationality Act, as amended (8 U.S.C. 1254), provides in pertinent part, as follows:

> (a) As hereinafter prescribed in this section, the Attorney General may, in his discretion, suspend deportation and adjust the status to that of an alien lawfully admitted for permanent residence, in the case of an alien who applies to the Attorney General for suspension of deportation and—
>
> (1) is deportable under any law of the United States except the provisions specified in paragraph (2) of this subsection; has been physi-

> cally present in the United States for a continuous period of not less than seven years immediately preceding the date of such application, and proves that during all of such period he was and is a person of good moral character; and is a person whose deportation would, in the opinion of the Attorney General, result in extreme hardship to the alien or his spouse, parent, or child, who is a citizen of the United States or an alien lawfully admitted for permanent residence.

STATEMENT

The essential facts are not in dispute. Petitioners are citizens of the Republic of China on Taiwan who concede their deportability. Petitioner Cheng was admitted to the United States in June 1952 as a nonimmigrant government official, a captain in the Chinese Nationalist Air Force, coming to this country for advanced military training. He resigned his commission in October 1952 when his military unit returned to Taiwan. Petitioner Lin was admitted to the United States in February 1953 as an accredited official of a foreign government, a first lieutenant in the Chinese Nationalist Air Force, coming to this country for eleven weeks of advanced pilot training under the Mutual Defense Assistance Program of Nationalist China and the United States. Upon completion of the training program, Lin refused to return to Taiwan with his unit. Each petitioner has remained in the United States since the return of his military unit to Taiwan.

It is not necessary to set forth in its entirety the complex history of legal proceedings in this case

which have lasted for well over a decade. The significant fact here is that petitioners, after having been found deportable, moved (inter alia) for suspension of deportation on grounds of "extreme hardship," pursuant to 8 U.S.C. 1254 and, in the alternative, to withhold their deportation to Taiwan on grounds of physical persecution, under 8 U.S.C. 1253(h). At hearings before a Special Inquiry Officer petitioners offered testimony that they had made numerous public statements criticizing the Chiang Kai Shek regime as a "dictatorship" and "police state" which had been reported to the Nationalist Chinese authorities. They contended that, upon being returned to Taiwan, they would likely be treated as political defectors and, in addition to being tried for desertion from the armed forces, there was a strong possibility that they would be sent to Green Island for "rehabilitation" or possibly executed, and that, if they ever were permitted to leave Green Island, they would have a difficult time securing employment because of government pressure directed against them. They offered the testimony of an expert on Nationalist China, who testified generally as to the kind of treatment which that government was likely to accord to persons in petitioners' position (See R. 31–57).

In rebuttal, the government introduced a letter from the Nationalist Chinese Counsel General at San Francisco stating that petitioners would be prosecuted only for desertion in accordance with the Armed Forces Criminal Code, a crime which carried a maximum penalty of three years' imprisonment. In addition, a letter from the United States Department of

State was admitted, stating that, on the basis of information available, the Department did not consider it likely that petitioners would be subjected to persecution, although they might be prosecuted for desertion.[1] The Special Inquiry Officer declined to express any opinion as to whether petitioners would be subject to persecution. Instead, he held that it would be an abuse of discretion to grant petitioners' motions, considering the purposes for which they entered this country, and the existence of the Mutual Defense Program between Taiwan and the United States (R. 136–145).[2] In 1967, after the proceedings had been reopened for the taking of new testimony, the Special Inquiry Officer rendered a further opinion adhering to his former ruling (R. 18–25). He stated (R. 23–24):

> To grant his [petitioner Cheng's][3] request would in my judgment be inconsistent with our Mutual Defense Assistance Program with Nationalist China and hence with our national interest. It cannot be that the Attorney General, and I as his delegate, must exercise the discre-

---

[1] The State Department letter (*supra*) was actually introduced in the reopened proceedings following the Special Inquiry Officer's initial decision but, in the present posture of the case, nothing hinges on this chronology.

[2] Petitioners had previously applied for adjustment of their statuts to that of permanent residents under the Refugee Relief Act, 50 U.S.C. App. 1971(d). Congress disapproved the grant of permanent residence in 1959 by a resolution, on the ground that petitioners, as nationals of a country allied to the United States and as military personnel admitted under a Mutual Defense Program, were not "refugees" within the meaning of the Act. See Pet. p. 14 n. 5.

[3] An opinion identical in all pertinent respects was rendered in regard to petitioner Lin.

> tion reposed in us blind to the incompatibility of the respondent's conduct and our national interest. In the absence of the most compelling equities in the respondent's favor, our national interest should not be subordinated to his conduct in derogation thereof. As there are no equities in this case sufficient to override our national interest, the respondent's application for temporary withholding of his deportation to Formosa * * * is denied in the exercise of discretion. For the same reason, his application for suspension of deportation is denied in the exercise of discretion.

The Board of Immigration Appeals thereafter issued opinions sustaining the Special Inquiry Officer's decisions on discretionary grounds and specifically denying petitioners' contention that the officer was required to make a finding on the issue of eligibility for relief under 8 U.S.C. 1253(h), *i.e.*, as to whether petitioners would be subject to persecution in Taiwan (Pet. App. C, 6–16). The Service then moved to have the Board "clarify" the scope of its rulings. Accordingly, the Board issued a further opinion (Pet. App. C, 1–5) in which it stated (Pet. App. C, 4):

> Upon a full consideration of all the evidence, including a claim that the respondents would be punished as defectors, which was refuted by evidence presented to the Service from the State Department that it was not considered likely that the respondents would be subject to persecution if deported to Taiwan but might be subject to legal prosecution for violation of the Armed Forces Criminal Code of the Republic of China, *we held that upon the merits and as*

> *a matter of discretion the respondents had not made a case of persecution* within the meaning of Section 243(h) if they were to be returned to Formosa. [Emphasis supplied.]

The Board went on to hold that the possibility of prosecution for desertion could not be considered "persecution" within the meaning of Section 243(h), Pet. App. C, 5. It reiterated that its former opinions should be read as reflecting its dual conclusion that "there was no showing of persecution on account of race, religion, or political opinion, either upon the merits or as a matter of discretion" (*ibid.*). Concerning the denial of suspension of deportation, the Board indicated that it had concluded in its previous opinion, as to petitioner Cheng, "that there were no substantial equities * * * other than those arising from the fact that he refused to return to the country of his nationality after completing the program of military training for which he entered the United States, that this factor alone was insufficient to support a finding of 'extreme hardship' within the meaning of Section 244(a)(1); and [that] the respondent [was] statutorily ineligible for suspension of deportation" (Pet. App. C, 3).[4]

---

[4] Petitioner Lin's case had been treated somewhat differently because of the fact that he had in 1962 married a United States citizen who subsequently became seriously mentally ill and was hospitalized with poor prospects of recovery. Petitioner had not heard from her in over two-and-one-half years and had made no contribution to her support since March 1964 (Pet. App. C, 12–13). With the wife thus removed as a factor relevant to the question of hardship, the situations of the two petitioners on the hardship issue appear to be identical. Petitioners do not contend otherwise (Pet. 9).

The court of appeals affirmed *per curiam* (Pet. App. A).[5]

ARGUMENT

Section 243(h) of the Immigration and Nationality Act, 8 U.S.C. 1253(h) provides:

> The Attorney General is authorized to withhold deportation of any alien within the United States to any country in which in his opinion the alien would be subject to persecution on account of race, religion, or political opinion and for such period of time as he deems to be necessary for such reason.

A predecessor statute, enacted in 1950, *required* the Attorney General to withhold deportation of an alien to a country where he would be subject to "physical persecution." 64 Stat. 1010 (Sec. 23 of the Internal Security Act of 1950). In 1952, the statute was passed in substantially its present form[6] using the word "authorized" instead of "required." This was apparently done to make clear that the withholding of deportation was a matter for the exercise of the Attorney

---

[5] The court cited *Kasravi* v. *INS* (C.A. 9, July 23, 1968), and *Hosseinmardi* v. *INS*, 391 F. 2d 914 (C.A. 9). The Federal Reporter volume supposedly containing the *Hosseinmardi* opinion indicates that that opinion was withdrawn by order of the court. The *Kasravi* opinion is set forth at Pet. App. D. An opinion in *Asghari* v. *INS*, relied on in *Kasravi*, is reported at 396 F. 2d 391 (C.A. 9).

[6] The phrase "physical persecution," was retained. 66 Stat. 214. A 1965 amendment, deleting "physical persecution," and substituting the phrase "persecution on account of race, religion, or political opinion," was made to clarify the meaning of "persecution." See 79 Stat. 918. Gordon and Rosenfield, *Immigration Law and Procedure* (1967 ed.) § 5.16b.

General's discretion. Such exercise of discretion necessarily involves a judgment on the totality of circumstances. Judicial review of an order withholding deportation in the exercise of discretion is, therefore, more limited than judicial review of an order of deportation, which is based on specific factual findings. Contrary to petitioners, we do not read the opinion of the court below as holding that the determination of the Attorney General under Section 243(h) is not subject to any review. Its citation of *Kasravi* v. *United States* (C.A. 9, July 23, 1968, Pet. App. D), indicates that the court deemed the exercise of discretion reviewable but only for abuse or for application of improper standards. See also *Zupicich* v. *Esperdy,* 319 F. 2d 773 (C.A. 2), certiorari denied, 376 U.S. 933; *Sovich* v. *Esperdy,* 319 F. 2d 21, 29 (C.A. 2). The court below properly concluded that no abuse of discretion had been shown here.

The record clearly supports the conclusion that this was not a case for the grant of relief under Section 243(h). The Board of Immigration Appeals had a right to consider that petitioners' claims of persecution were largely self-serving declarations. Against this evidence was the assurance of the Chinese Consul-General that persecution would not occur and the letter from the Department of State doubting that persecution would take place if petitioners were returned to Taiwan. The factor stressed by the hearing officer—that petitioners' desertion from the armed forces of their nation while in this country for military training inhibits the Mutual Defense Program between the United States and the Republic of

China—was pertinent to a decision whether discretion should be exercised in favor of petitioners.[7]

2. In view of the fact that Congress has specifically provided in Section 243(h) authority to withhold deportation to a particular country on grounds of political persecution it is clear that "extreme hardship" as used in Section 244 does not encompass such a claim. Rather, the provision for suspension of deportation in Section 244 is designed for the situation where deportation from the United States to *any* country would be an extreme hardship to an alien or his family. If relief under Section 244 is granted, the alien is not deported at all but his status is that of an alien admitted for permanent residence. Petitioners have, as the courts below held, presented no considerations which would show extreme hardship in their deportation from the United States.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

ERWIN N. GRISWOLD,
Solicitor General.
FRED M. VINSON, JR.,
Assistant Attorney General.
BEATRICE ROSENBERG,
ROGER A. PAULEY,
Attorneys.

JANUARY 1969.

---

[7] It is significant that Congress thought it unseemly to consider petitioners in the status of "refugees." See note 2, *supra.*

U.S. GOVERNMENT PRINTING OFFICE: 1968